

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

Tudor Chirila, Administrator, THE ESTATE  
OF HOW TZU HUANG, )

Plaintiff, )

v. )

BANK OF AMERICA, N.A.; RECONTRUST  
COMPANY, N.A.; and DOES I-V; and ROE  
ENTITIES I through X, jointly and severally, )

Defendants. )

3:11-cv-00005-RCJ-WGC

**ORDER**

Currently before the Court are Defendants' Motion to Dismiss for Failure to Prosecute (#31), Defendants' Motion for Summary Judgment and to Dissolve Preliminary Injunction (#32), and Defendants' Motion to Expunge Lis Pendens (#33).

**BACKGROUND**

**A. Factual Background**

Prior to her death on December 23, 2008, decedent How Tzu Huang ("Huang") obtained a mortgage in April 2006 from Defendant Bank of America, N.A. ("Bank of America") on her home, the real property located at 4832 Meadow Springs Dr., Reno, NV 89509, APN Number 023-173-08. (Opp. Mot. Summ. J. Ex. 3, Deed of Trust (#37-3).)

Huang passed away on December 23, 2008, while taking a shower in an upstairs bathroom, resulting in water damage to the property. (Mot. Summ. J. Ex. E (#32-5).) Huang's estate (the "Estate") obtained several checks for the property damage from the insurer of the property (the "insurance checks") that were made out to both Defendant Bank of America and the administrator. (*Id.*) In order to be negotiated, the insurance checks required

1 Defendant Bank of America's endorsement. (*Id.*) However, Defendant Bank of America has  
2 refused to endorse the insurance checks or allow their deposit into the Estate's account due  
3 to a dispute over the use of the proceeds. (*Id.*) Counsel for the Estate sent a letter to Bank  
4 of America, dated August 12, 2009, disputing whether the proceeds must be used to make  
5 repairs. (*Id.*)

6 In January 2009, one of Huang's relatives, Chen-Hon Lu, allegedly wrote two checks  
7 from Huang's checkbook to himself in the amounts of \$10,000 and \$13,000 (the "forged  
8 checks"). (Opp. to Mot. Summ. J. Ex. 5 (#37-5).) Defendant Bank of America cashed the  
9 forged checks from Huang's account. (Mot. Summ. J. Ex. H (#32-8).)

10 The estate defaulted on the loan on May 1, 2009. (Mot. Summ. J. Ex. B, Notice of  
11 Default and Election to Sell (#32-2).) On July 13, 2010, ReconTrust Company, N.A.  
12 ("ReconTrust") recorded a Notice of Default/Election to Sell. (*Id.*)

### 13 **B. Procedural Background**

14 Plaintiff filed a complaint (Pet. Removal Ex. A, Complaint (#1-2)) in the Second Judicial  
15 District Court of the State of Nevada in and for the County of Washoe (the "State Court") on  
16 December 1, 2010. On December 15, 2010, the State Court issued a preliminary injunction  
17 enjoining Defendants from commencing a trustee's sale or foreclosure on the subject property.  
18 (Notice of Entry of Order, Ex. 1, Preliminary Injunction Order #(4-2).) The State Court further  
19 ordered Defendant Bank of America to endorse the insurance checks and deposit the funds  
20 in the Estate's account. (*Id.*)

21 On January 3, 2011, Defendants removed the case to the United States District Court  
22 for the District of Nevada via a petition (#1) for removal. On January 11, 2011, Defendants  
23 moved (#5) to dismiss the complaint (#1-2) pursuant to Federal Rule of Civil Procedure  
24 12(b)(6). The Court granted (#12) the motion to dismiss (#5) with leave to file a renewed  
25 motion to file an amended complaint. On March 1, 2011, Plaintiff filed its motion (#13) to  
26 amend the complaint. On October 14, 2011, the Court granted Plaintiff's motion (#13) to  
27 amend the complaint with respect to Plaintiff's proposed causes of action alleging wrongful  
28 payment of checks with forged endorsement; breach of contract; and breach of the implied

1 covenant of good faith and fair dealing. The Court denied leave to amend to include claims  
2 for wrongful foreclosure and unauthorized debt collection. The parties were ordered to brief  
3 the issue of the status of the State Court's preliminary injunction, and the parties submitted  
4 points and authorities.

5 On June 27, 2012, Defendants filed a Motion to Dismiss for Failure to Prosecute (#31),  
6 a Motion for Summary Judgment (#32), and a Motion to Expunge Lis Pendens (#33).

7 **MOTION TO DISMISS FOR FAILURE TO PROSECUTE (#31)**

8 Defendants request that the Court dismiss the action for failure to prosecute under  
9 Federal Rule of Civil Procedure 41(b). Specifically, Defendants argue that Plaintiff failed to  
10 schedule an initial conference under Federal Rule of Civil Procedure 26(f), failed to provide its  
11 initial disclosures, and failed to establish a discovery plan.

12 Rule 41(b) provides that if a plaintiff "fails to prosecute or to comply with these rules or  
13 a court order, a defendant may move to dismiss the action or any claim against it." FED. R. CIV.  
14 P. 41(b). "A Rule 41(b) dismissal 'must be supported by a showing of unreasonably delay.'" *Omstead v. Dell, Inc.*, 594 F.3d 1081, 1084 (9th Cir. 2010) (quoting *Henderson v. Duncan*, 779  
15 F.2d 1421, 1423 (9th Cir. 1986)). The court must weigh the following factors in determining  
16 whether such dismissal is warranted: "(1) the public's interest in expeditious resolution of  
17 litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the defendants;  
18 (4) the public policy favoring disposition of cases on their merits and (5) the availability of less  
19 drastic sanctions." *Id.* (quoting *Henderson*, 779 F.2d at 1423.)

20  
21 Here, weighing the factors along with the requirement of unreasonable delay does not  
22 lead to a conclusion that dismissal under Rule 41(b) is warranted. While there is a public  
23 interest in resolving the case and managing the docket, there is also a strong public policy  
24 favoring disposition of the case on the merits. The Court cannot deny that there is prejudice  
25 to defendants in engaging in prolonged litigation involving a mortgage in default; however,  
26 much of the delay in the action is due to the necessity of allowing Plaintiff to amend its  
27 complaint to include proper claims. While Plaintiff may not have properly and promptly  
28 scheduled Rule 26(f) conferences or provided initial disclosures, Plaintiff claims that such delay

1 was due to the briefing on the issue of the status of the state court's preliminary injunction.  
2 Plaintiff represents that the initial conference was held on July 10, 2012, and the proposed  
3 scheduling order and initial disclosures were being prepared at that time. Defendants' Motion  
4 to Dismiss (#31) is accompanied by a Motion for Summary Judgment (#32), which provides  
5 an alternative means of resolving the action on its merits. For that reason, the Motion to  
6 Dismiss for Failure to Prosecute (#31) shall be denied.

### 7 **MOTION FOR SUMMARY JUDGMENT (#32)**

#### 8 **A. Legal Standard**

9 Summary judgment allows courts to avoid unnecessary trials where no material factual  
10 dispute exists. *N.W. Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18 F.3d 1468, 1471 (9th Cir.  
11 1994). The court must view the evidence and the inferences arising therefrom in the light most  
12 favorable to the nonmoving party, *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir. 1996), and  
13 should award summary judgment where no genuine issues of material fact remain in dispute  
14 and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c).  
15 Judgment as a matter of law is appropriate where there is no legally sufficient evidentiary basis  
16 for a reasonable jury to find for the nonmoving party. FED. R. CIV. P. 50(a). Where reasonable  
17 minds could differ on the material facts at issue, however, summary judgment should not be  
18 granted. *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995), *cert. denied*, 516 U.S.  
19 1171(1996).

20 The moving party bears the burden of informing the court of the basis for its motion,  
21 together with evidence demonstrating the absence of any genuine issue of material fact.  
22 *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party has met its burden,  
23 the party opposing the motion may not rest upon mere allegations or denials in the pleadings,  
24 but must set forth specific facts showing that there exists a genuine issue for trial. *Anderson*  
25 *v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Although the parties may submit evidence  
26 in an inadmissible form — namely, depositions, admissions, interrogatory answers, and  
27 affidavits — only evidence which might be admissible at trial may be considered by a trial court  
28 in ruling on a motion for summary judgment. FED. R. CIV. P. 56(c); *Beyene v. Coleman Sec.*

1 *Servs., Inc.*, 854 F.2d 1179, 1181 (9th Cir. 1988).

2 In deciding whether to grant summary judgment, a court must take three necessary  
 3 steps: (1) it must determine whether a fact is material; (2) it must determine whether there  
 4 exists a genuine issue for the trier of fact, as determined by the documents submitted to the  
 5 court; and (3) it must consider that evidence in light of the appropriate standard of proof.  
 6 *Anderson*, 477 U.S. at 248. Summary judgment is not proper if material factual issues exist  
 7 for trial. *B.C. v. Plumas Unified Sch. Dist.*, 192 F.3d 1260, 1264 (9th Cir. 1999). “As to  
 8 materiality, only disputes over facts that might affect the outcome of the suit under the  
 9 governing law will properly preclude the entry of summary judgment.” *Anderson*, 477 U.S. at  
 10 248. Disputes over irrelevant or unnecessary facts should not be considered. *Id.* Where there  
 11 is a complete failure of proof on an essential element of the nonmoving party’s case, all other  
 12 facts become immaterial, and the moving party is entitled to judgment as a matter of law.  
 13 *Celotex*, 477 U.S. at 323. Summary judgment is not a disfavored procedural shortcut, but  
 14 rather an integral part of the federal rules as a whole. *Id.*

## 15 **B. Discussion**

### 16 1. Forged Checks

17 Defendants argue that Plaintiff’s causes of action based on the forged checks fails as  
 18 a matter of law because an action to recover for forged checks is time-barred. Decedent  
 19 Huang had a checking account with Bank of America governed by the Deposit Agreement and  
 20 Disclosures (“the Agreement”). (Mot. Summ. J. Ex. G (#32-7).) The Agreement provides the  
 21 following with respect to forged or unauthorized drawer’s signature on checks:

#### 22 **Reviewing Your Account Statements**

23 Your review of your statements, checks and other items is one of the best ways  
 to help prevent the wrongful use of your account. You agree:

- 24 -to review your statements, checks, and other items and reconcile  
 them as soon as they are made available to you;
- 25 -that our statements provide sufficient information to determine the  
 identity and authenticity of any transaction including without limit,  
 whether any are forged, altered or unauthorized if the statement  
 26 includes the item number, amount and the date the item posted to  
 your account;
- 27 -to report any problems or unauthorized transactions as soon as  
 possible; and
- 28 -that 60 days after we send a statement and any accompanying  
 items (or otherwise make them available) is the maximum

1 reasonable amount of time for you to review your statement or  
2 items and report any problem or unauthorized transaction related  
3 to a matter shown on the statement or items. There are  
4 exceptions to this 60-day period. For forged, unauthorized or  
missing endorsements, you must notify us within the period  
specified by the state law applicable to your account. For  
substitute checks, you must notify us within 40 days to qualify for  
an expedited recredit.

5 (Mot. Summ. J. Ex. G at 25 (#32-7).) The Agreement further provides that, except as  
6 otherwise expressly provided elsewhere in the Agreement, if the account holder fails to notify  
7 Bank of America in writing of suspected problems or unauthorized transactions within sixty  
8 days after the bank statement is available, the account holder may not make a claim against  
9 the bank relating to the unreported problems or unauthorized transactions, "regardless of the  
10 care or lack of care we may have exercised in handling [the] account" and that the account  
11 holder may not bring any legal actions against the bank relating to those transactions. (*Id.*)

12 Plaintiff alleges that after Huang's death, Huang's relative Chen-Hon Lu drafted two  
13 checks on Huang's checking account with Bank of America in the amounts of \$10,000 and  
14 \$13,000. Huang's January 2009 account statement for the period of December 19, 2008  
15 through January 20, 2009 identifies that a check for \$10,000 was drawn on Huang's account  
16 on January 12, 2009. (Mot. Summ. J. Ex. H (#32-8).) The February 2009 account statement  
17 for the period of January 21, 2009 through February 17, 2009 identifies that a check for  
18 \$13,000 was drawn on Huang's account on January 28, 2009. (Mot. Summ. J. Ex. I (#32-9).)  
19 The declaration, dated March 17, 2011, of Greg Lyles, a manager at Bank of America's Check  
20 Fraud Center, is attached as part of Exhibit F, and provides that Bank of America sends  
21 account statements to its account customers each month within two or three business days  
22 following the statement date as part of a routine and regularly conducted business activity.  
23 (Mot. Summ. J. Ex. F (#32-6).) Lyles states that the following exhibits contain true and correct  
24 copies of Huang's signature, the Agreement, Huang's January 2009 monthly account  
25 statement, and February 2009 account statement. (*Id.*) Lyles also declares that there were  
26 no reports filed by the Estate regarding checks drawn with forged signatures. (*Id.*)

27 Nevada law provides that if a bank sends or makes available an account statement, the  
28 customer must promptly notify the bank if the customer should reasonably have discovered

1 an unauthorized payment because of a purported signature on behalf of the customer. NEV.  
2 REV. STAT. § 104.4406. In addition, “without regard to care or lack of care of either the  
3 customer or the bank” a customer who does not report his or her unauthorized signature within  
4 one year after a bank statement is made available to the customer may not assert against the  
5 bank the unauthorized signature. NEV. REV. STAT. § 104.4406. Generally, the statute of  
6 limitations is three years for actions related to forged signatures on checks. NEV. REV. STAT.  
7 § 104.4111. However, the statute of limitations and the required reporting period may be  
8 varied by agreement. NEV. REV. STAT. § 104.4103. That section provides:

9       The effect of the provisions of this article may be varied by agreement, but the  
10       parties to the agreement cannot disclaim a bank’s responsibility for its own lack  
11       of good faith or failure to exercise ordinary care or limit the measure of damages  
12       for the lack of failure.

13 NEV. REV. STAT. § 104.4103. Under the Agreement, Plaintiff had sixty days to notify Bank of  
14 America in writing of the checks bearing allegedly forged drawer’s signatures. While a Nevada  
15 court has not ruled that a shortened statute of limitations is valid in these circumstances,  
16 Nevada law expressly provides that the three-year statute of limitations may be varied by  
17 agreement, and courts in other jurisdictions have approved agreements providing similar, or  
18 even shorter, statutes of limitations. *See, e.g., Parent Teacher Ass’n, Public School 72 v. Mfrs.*  
19 *Hanover Trust Co.*, 524 N.Y.S.2d 336, 340 (N.Y. Civ. Ct. 1988). In *Parent Teacher Ass’n*, the  
20 court considered an agreement shortening the statute of limitations to fourteen days of the  
21 delivery of an account statement. The court noted that the agreement does not absolve the  
22 bank of its duty to use good faith and ordinary care, or absolutely bar the account holder from  
23 suit or excuse future liability. *Id.* Such agreements encourage “investigation and preservation  
24 of evidence” and “vigilance by both parties to a deposit contract, thus making continued fraud  
25 or wrongdoing less likely.” *Id.* The court found that the agreement to shorten the statute of  
26 limitations was valid, enforceable, and binding on the parties. *Id.*

27       We likewise find that the three-year statute of limitations on actions against a bank to  
28 recover amounts drawn by forged checks may be varied by agreements such as the  
Agreement in this case because Nevada law expressly provides for such agreements. Plaintiff  
claims that the Estate notified the Bank of America in June 2009 via the Bank of America’s

1 employee and agent Paula Cobb, and that the Estate worked with Ms. Cobb to investigate the  
2 forged checks. (Opp. Mot. Summ. J. Ex. 4, Baker Aff. (#37-4).) In an affidavit, William A.  
3 Baker, probate counsel for the Estate, declared that he worked with Paula Cobb in June, July  
4 and August of 2009 to investigate fraudulent checks and withdrawals against Huang's bank  
5 account after her death. (*Id.*) Defendants point out, however, that even assuming this is true,  
6 Plaintiff failed to make a report in writing, and June 2009 is not within the 60-day period  
7 required under the Agreement in any case if the period began to run once the account  
8 statements were delivered. Furthermore, Defendants provide evidence that Ms. Cobb was not  
9 employed by Bank of America during the dates Baker allegedly worked with Ms. Cobb to  
10 investigate the fraud. Ms. Cobb was laid off on April 3, 2009, and was not re-employed by the  
11 bank until August 17, 2009. (Reply, Ex. B (#41-2).)

12 While the statute of limitations would normally begin to run when the statement is  
13 delivered, there is some question as to whom these statements were delivered to and how  
14 soon the Estate was able to examine the account statements. In a California case, the  
15 California Court of Appeal noted that "it is not too great a burden in cases where the customer  
16 has died to delay the start of the notification period until a statement becomes available to a  
17 successor account holder." *Mac v. Bank of America*, 90 Cal. Rptr. 2d 476, 481 (Cal. Ct. App.  
18 1999). Plaintiff argues that Ms. Cobb was a neighbor of Huang and that she retrieved Huang's  
19 mail after her death. Plaintiff also acknowledges that the Bank mailed the account statements,  
20 but disputes whether the retrieval of Huang's mail by Ms. Cobb began the running of the time  
21 period to report the forged checks. Therefore, the issue of when the bank made the account  
22 statements "available" to the Estate is indeterminable at this time, prior to discovery. What is  
23 clear, however, is that the Estate became aware of the allegedly forged checks at least by  
24 June 2009, when it allegedly investigated the issue with Ms. Cobb.

25 There is no dispute that the Estate failed to notify the bank in writing of the fraud within  
26 sixty days of becoming aware of the forged checks. The Estate claims that it notified, and  
27 worked with, an employee of the Bank of America, Ms. Cobb, to investigate the forged checks  
28 in June, July, and August 2009. Bank of America claims that Ms. Cobb was not an employee

1 at the time of such investigation, and thus, there is a dispute over whether the Bank received  
2 even verbal notice of the forged checks within sixty days of the Estate's discovery of the forged  
3 checks. While it is undeniable that written notice was not given, there is some dispute over  
4 whether the Bank had actual notice of the forged checks despite the lack of a written report.  
5 In some cases, the requirement of written notice has been considered waived or an inessential  
6 part of an agreement when there is evidence that the parties had actual notice. *See, e.g.,*  
7 *Gollihue v. Nat'l. City Bank*, 969 N.E.2d 1233, 1238-39 (Ohio Ct. App. 2011). In *Gollihue*, the  
8 court acknowledged that although courts generally should give effect to the plain meaning of  
9 the parties' contracts, in some circumstances, courts will not strictly enforce language requiring  
10 written notice. *Id.* at 1238. If the Estate duly notified the Bank within sixty days of the account  
11 statements showing forged checks becoming available to it, and the Bank failed to indicate that  
12 a written report must be submitted, and failed to act on the verbal notice, there may be  
13 question as to whether the Bank exercised reasonable care under the circumstances and  
14 whether actual notice to the Bank is sufficient to allow the Estate to proceed on the forged  
15 checks claim.

16 Several disputes of material fact regarding the forged checks remain at this time, as the  
17 Motion for Summary Judgment (#32) was filed before discovery concluded. For that reason,  
18 summary judgment on the forged checks claim shall be denied at this time.

## 19 2. Insurance Checks

20 Plaintiff also brought causes of action for breach of contract and breach of the implied  
21 covenant of good faith and fair dealing relating to the insurance checks issued for repair of the  
22 water damage which occurred at the time of Huang's death.<sup>1</sup>

23 Bank of America provided a home loan secured by a deed of trust to Huang. (Mot.  
24 Summ. J. Ex. A, Deed of Trust (#32-1).) With respect to insurance proceeds, the deed of trust  
25 provides:

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26  
27 <sup>1</sup> Plaintiff's amended complaint (#21) lists ReconTrust as a defendant, but each cause  
28 of action is made against Bank of America only. To the extent that Plaintiff is claiming that any  
cause of action against Bank of America applies against ReconTrust as an agent for Bank of  
America, our analysis applies equally to both defendants.

1 Unless Lender and Borrower otherwise agree in writing, any insurance proceeds,  
2 whether or not the underlying insurance was required by Lender, shall be applied  
3 to restoration or repair of the Property, if restoration or repair is economically  
4 feasible and Lender's security is not lessened. During such repair and restoration  
5 period, Lender shall have the right to hold such insurance proceeds until Lender  
6 has had an opportunity to inspect such Property to ensure the work has been  
7 completed to Lender's satisfaction, provided that such inspection shall be  
undertaken promptly. Lender may disburse proceeds for the repairs and  
restoration in a single payment or in a series of progress payments as the work  
is completed. . . . If the restoration or repair is not economically feasible or  
Lender's security would be lessened, the insurance proceeds shall be applied to  
the sums secured by this Security Instrument, whether or not then due, with the  
excess, if any, paid to Borrower.

8 (Mot. Summ. J. Ex. A, Deed of Trust ¶ 5 (#32-1).)

9 Plaintiff defaulted on the mortgage on May 1, 2009. (Mot. Summ. J. Ex. B, Notice of  
10 Default (#32-2).) In a letter dated July 11, 2009, Plaintiff's probate attorney acknowledged that  
11 Plaintiff had received the insurance checks for the water damage claim to the Property. (Mot.  
12 Summ. J. Ex. C (#32-3).) On July 17, 2009, Bank of America wrote to Plaintiff, explaining that  
13 Plaintiff must endorse the insurance claim drafts, and that Bank of America would only release  
14 claim proceeds as the repairs are completed because the loan is in default. (Mot. Summ. J.  
15 Ex. D (#32-4).) Bank of America required that the repairs be completed by a licensed  
16 contractor, and that Plaintiff provide copies of the signed contract with the contractor, the  
17 contractor's estimate, the contractor's payment requirements, and insurance adjuster's  
18 estimate of damages. (*Id.*) In a letter dated August 12, 2009, Plaintiff's probate attorney  
19 responded that he was unaware that the mortgage is in default, and disputed that the funds  
20 are available only to make repairs. (Mot. Summ. J. Ex. E (#32-5).)

21 Plaintiff's claims for breach of contract and breach of the implied covenant of good faith  
22 and fair dealing fail as a matter of law because Plaintiff has not shown that Defendants breach  
23 of any term of the deed of trust or acted in any manner to contravene the purpose and spirit  
24 of the deed of trust. The language of the deed of trust clearly provides that the insurance  
25 proceeds should be applied to restoration or repair, and Bank of America retained the right to  
26 hold the proceeds until the work has been completed, or to disburse according to a payment  
27 schedule. Plaintiff is not entitled to the proceeds for a purpose other than repair or restoration  
28 unless such repair is deemed economically unfeasible or the home value would be lessened,

1 and the amount of the insurance checks exceeds the loan. Plaintiff's interpretation of the  
2 terms of the deed of trust misconstrues the language in order to avoid the contractual terms.  
3 Plaintiff argues that the terms allow the lender to "pocket the insurance proceeds and leave  
4 the homeowner homeless." (Opp. to Mot. Summ. J. (#37).) Nowhere in the evidence provided  
5 by both parties is there support for such an interpretation. While Bank of America did refuse  
6 to release the insurance proceeds without being provided information related to any ongoing  
7 or planned repair, Bank of America had the right to do so under the terms of the deed of trust.  
8 Plaintiff, on the other hand, disputed whether the proceeds should be used for the repair, and  
9 appeared to suggest that the proceeds may simply be released to Plaintiff to be used as it sees  
10 fit—for example, in order to cure the default and continue making mortgage payments. The  
11 language of the deed of trust does not allow Plaintiff to unilaterally use insurance proceeds  
12 released for purposes of repairing damage to the Property in that manner. There is no dispute  
13 that the Property was damaged and that the insurance checks were made out for that purpose.  
14 Bank of America did not have a duty, under the deed of trust, to release the funds to Plaintiff  
15 without protecting its interest in the Property, and summary judgment shall be granted on the  
16 claims relating to the insurance checks.

### 17 3. Preliminary Injunction

18 The State Court's preliminary injunction preventing Defendants from conducting a  
19 trustee's sale or otherwise transferring ownership of the Property shall not be dissolved at this  
20 time. While claims expressly dealing with the foreclosure and the mortgage have been  
21 dismissed, claims based on the forged checks remain. There is a question of material fact  
22 over whether the default could have been prevented had the forged checks not depleted the  
23 Estate's account. Until that question has been resolved, the Court declines to dissolve the  
24 preliminary injunction.

### 25 **MOTION TO EXPUNGE LIS PENDENS (#33)**

26 Defendant requests that the lis pendens in this action be expunged, along with the  
27 preliminary injunction entered into by the state court. For the reasons stated above, the Court  
28 also declines to order the lis pendens expunged until questions concerning the forged checks

1 and the Estate's account with Bank of America have been resolved.

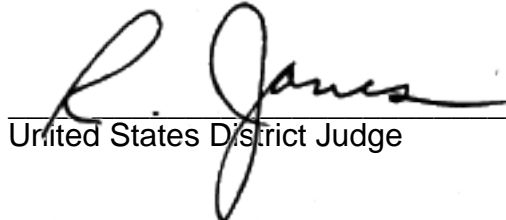
2 **CONCLUSION**

3 For the foregoing reasons, IT IS ORDERED that the Motion to Dismiss for Failure to  
4 Prosecute (#31) is **DENIED**.

5 IT IS FURTHER ORDERED that the Motion for Summary Judgment and to Dissolve the  
6 Preliminary Injunction (#32) is **GRANTED IN PART AND DENIED IN PART**. The Motion (#32)  
7 is **GRANTED** with respect to the breach of contract claim, and the breach of implied covenant  
8 of good faith and fair dealing insofar as it is based on the insurance checks. The Motion (#32)  
9 is **DENIED** with respect to Plaintiff's claim for wrongful payment of checks with forged  
10 endorsement and claim for breach of the implied covenant of good faith and fair dealing based  
11 on the forged checks. The preliminary injunction entered by the State Court shall not be  
12 dissolved at this time.

13 IT IS FURTHER ORDERED that the Motion to Expunge Lis Pendens (#33) is **DENIED**.

14  
15 DATED: This 25th day of January, 2013.

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18 United States District Judge  
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